**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

| | |
|---|---|
| THEODORE J. THOMPSON,<br><br>Plaintiff,<br><br>vs.<br><br>UNIVERSITY MEDICAL CENTER, et al.,<br><br>Defendants. | Case No. 2:07-cv-01378-RLH-PAL<br><br>**ORDER AND REPORT OF FINDINGS AND RECOMMENDATION**<br><br>(Mtn Clarification/Extend Time - Dkt. #33)<br>(Mtn to Serve Amended Compl. - Dkt. #31) |

Before the Court is Plaintiff Theodore J. Thompson's ("Plaintiff") Second Amended Complaint (Dkt. #26) filed on November 7, 2008 and Defendant University Medical Center's ("UMC") Emergency Motion for Clarification, And/Or Extension of Time to Respond to Complaint (Dkt. #33) filed on January 7, 2008. The court must screen Plaintiff's Second Amended Complaint and will then address UMC's Motion.

## DISCUSSION

### I. The Second Amended Complaint (Dkt. #26).

#### A. Legal Standard for Screening the Second Amended Complaint.

Upon granting a request to proceed *in forma pauperis*, a court must screen a complaint pursuant to § 1915(e). Specifically, federal courts are given the authority dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915(e)(2). When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. See Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is essentially a ruling on a question of law. See North Star Intern. v. Arizona Corp. Comm'n, 720 F.2d 578, 580 (9th Cir. 1983). In considering whether a plaintiff has stated a claim upon which relief can be granted, all material allegations in the complaint are accepted as true and are to be construed in the light most favorable to the plaintiff. See Russel v. Landrieu, 621 f.2d 1037, 1039 (9th Cir. 1980). Allegations of a *pro se* complaint are held to less stringent standards than formal pleading drafted by lawyers. See Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam).

**B. Factual Allegations Contained in the Second Amended Complaint.**

Plaintiff alleges that on September 26, 2006, he admitted himself into the Emergency Room at UMC because he was depressed, hearing voices, and suicidal. Second Amended Complaint at ¶ 2. UMC admitted Plaintiff on a seventy-two-hour hold pursuant to Nevada law. Id. at ¶ 10; N.R.S § 433A.145-190. UMC staff informed Plaintiff he would be transferred to the Southern Nevada Adult Mental Health Services ("SNAMHS") for inpatient care as soon as a bed became available. Second Amended Complaint at ¶ 4. On September 28, 2006, Plaintiff complained about severe pain caused by a hernia to a UMC psychiatrist who said he would refer Plaintiff to a medical doctor for treatment and surgery. Id. at ¶ 4-5. A medical doctor examined Plaintiff's hernia on September 29, 2006, ordered a CAT scan, started an I.V., and told Plaintiff surgery was necessary to remove the hernia. Id. at ¶ 5. Doctor Vicki Mazzorana also examined Plaintiff and served him with a petition for court-ordered admission because he was mentally ill and a danger to himself or others as defined in N.R.S. 433A.145. Id. at ¶ 3. The petition set a hearing in front of the Mental Health Court for October 6, 2006. Id.

On September 30, 2006, Plaintiff fell out of his hospital bed and injured his hand and right index finger. Id. at ¶6. Plaintiff began to complain about his injured hand and other problems to the charge nurse, "T. Esther A." (hereinafter, "Nurse Esther"), who allegedly became hostile with Plaintiff. Id. Dr. Mariam Marvasti ("Dr. Marvasti") visited Plaintiff the same day and informed him that the nurse had said that he should be discharged. Id. at ¶ 7. Plaintiff responded that he was suicidal and should not be discharged. Id. According to Plaintiff, Dr. Marvasti was irritated and angry, and she left, stating, "Well that's not what the nurse tells me." Id.

On October 1, 2006, Plaintiff requested to see a doctor for his injured hand. Id. at ¶ 8. When he showed his hand to Nurse Esther, she allegedly grabbed his finger "as if she intended to cause pain and hurt." Id. At 11:30 a.m., Nurse Esther, accompanied by two security guards, told Plaintiff he was being discharged. Id. at ¶ 9. Plaintiff alleges he tried to show her the petition and tell her he was awaiting a bed at SNAMHS, but she said she was discharging him regardless of what anyone else said, and she made Plaintiff get dressed and leave. Id. Plaintiff states that when he tried to discuss his discharge, the security officers and Nurse Esther and the security guards forced him to leave under verbal threats of force and with a security escort. Id. at ¶ 10. Later that evening, Plaintiff noticed that he was given the wrong amount of medication–less than a one-week supply instead of a two-week supply. Id. at ¶ 11. Plaintiff began feeling suicidal and took all of his medication in an attempt to kill himself. Id. at ¶ 12. He called his friend, who took him to the Emergency Room at Sunrise Hospital, where he was admitted. Id. at ¶ 13. Plaintiff was eventually transferred to a mental health care facility, treated, and discharged on October 12, 2006. Id.

**C. Legal Analysis and Screening.**

The Second Amended Complaint attempts to state a claim under 42 U.S.C. § 1983, alleging that Defendants (defined below) violated his rights under the First and Fourteenth Amendments, as well as Nevada state law. Generally, "[t]o state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42 (1988) (citation omitted).

**1. Parties Named in the Second Amended Complaint.**

States and state officers sued in their official capacities are not "persons" for purposes of a § 1983 action and may not be sued under the statute. Will v. Mich. Dept. of State Police, 491 U.S. 58, 71 (1989). On the other hand, § 1983 allows suits against state officers in their individual capacities for acts they took in their official capacities. Hafer v. Melo, 502 U.S. 21, 26 (1991). Likewise, local governments, such as municipalities, can be sued under § 1983, but only for "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or for a "governmental 'custom' even though such a custom has not received formal approval through the

body's official decisionmaking channels." Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 690-91 (1978).

Here, Plaintiff names the following individuals in his complaint: Dr. Marvasti, in her individual and official capacity; Nurse Esther, in her individual and official capacity; UMC; and "two unknown named UMC Security Guards" in their individual capacity; and Does 1-10 (hereinafter, the "Security Guards," and together with Dr. Marvasti, Nurse Esther, and UMC, the "Defendants"). Plaintiff alleges that Nurse Esther, the Security Guards, UMC, and Dr. Marvasti acted wrongfully under color of state law with deliberate indifference to his medical needs by wrongfully discharging him and/or ordering him to leave UMC under threat of force. Additionally, Plaintiff alleges that he was wrongfully discharged from the UMC and that UMC violated his rights by "having and adopting a policy and/or practice in place that allowed patients to be discharged without adequate medical care." Second Amended Complaint at ¶ 14. Based upon these allegations, and as described above, Plaintiff has shown that UMC, a county hospital, is subject to suit in this matter. See, e.g., Monell, 436 U.S. at 690 (stating that "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials....Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a custom or usage with the force of law") (internal citation omitted). However, because Plaintiff does not allege that the Doe Defendants committed any wrongdoing, the Court will dismiss the Amended Complaint against them. Plaintiff has not stated any basis for suing any of the individual defendants in their official capacity, and therefore, Plaintiff's claims against Dr. Marvasti, Nurse Esther, and the Security Guards in their official capacities will be dismissed.

Also, Plaintiff "must sufficiently plead that [defendants] engaged in state action" in order to establish liability under § 1983. Brunette v. Humane Society of Ventura County, 294 F.3d 1205, 1209 (9th Cir. 2002) (citation omitted). "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." McDade v. West, 223 F.3d 1135, 1139 (9th Cir. 2000) (emphasis added) (citing Wyatt v. Cole, 504 U.S. 158, 161 (1992)). A defendant only acts under the color of state law if he exercises power possessed by virtue of state law and made possible only because he "is clothed with the authority of state law." Id. at 1139-40.

"Whether a private party engaged in state action is a highly factual question." Brunette, 294 F.3d at 1209 (citations omitted). Here, Plaintiff states Defendants treated him while he was involuntarily committed to UMC pursuant to Nevada law. Plaintiff has sufficiently plead liability under § 1983 as to the Defendants under the state actor requirement by alleging his commitment and treatment were authorized by state law.

**2. Constitutional Allegations.**

In his First Cause of Action, Plaintiff claims that his Fourteenth Amendment right to procedural and substantive due process were violated. "Procedural due process provides 'a guarantee of fair procedure in connection with any deprivation of life, liberty, or property' by the government.'" Denney v. Drug Enforcement Admin., 508 F. Supp. 2d 815, 833 (E.D.Cal. 2007) (citing Collins v. City of Harker Heights, 503 U.S. 115 (1992)). The Ninth Circuit has held that:

> Substantive due process "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." Specifically, the substantive component of the Due Process Clause "forbids the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered liberty.'

Denney, 508 F. Supp. 2d at 833 (citing Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 948 (9th Cir. 2004)) (citations omitted). "Liberty" under the Fourteenth Amendment includes many of the rights protected in the Bill of Rights, such as the First Amendment right to Free Speech, Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Café, 315 U.S. 722, and the Eighth Amendment guarantee against cruel and unusual punishment, La. ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947). Civilly committed individuals also have liberty interests cognizable under the Fourteenth Amendment, such as the right to safety and medical care. DeShaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189, 199-200 (1989); Youngberg v. Romeo, 457 U.S. 307, 317-18 (1982).

Although the government must use adequate procedures before committing a mental health patient, Plaintiff does not appear to be arguing that his commitment to UMC violated his due process rights. Rather, Plaintiff alleges that Nurse Esther, Dr. Marvasti, the Security Guards, and UMC: (a) disregarded his medical needs by discharging him from UMC; and (b) violated his constitutional liberties without adequate procedures in violation of his substantive and procedural due process rights.

Plaintiff alleges he informed Nurse Esther and Dr. Marvasati that he was suicidal, had a petition for court-ordered admission to a mental health facility, and his hand was injured, but they nonetheless discharged him regardless of what anyone else said. Further, Plaintiff asserts that UMC violated his right to procedural and substantive due process in violation of the Fourteenth Amendment by having a policy or practice in place that allowed patients to be discharge in contravention of their medical needs. Assuming the truth of these allegations, the Court finds the complaint states a § 1983 claim against Nurse Esther, the Security Guards, and Dr. Marvasti in their official capacities, as well as UMC, for violation of Plaintiff's rights to procedural and substantive due process under the Fourteenth Amendment.

In his second cause of action, Plaintiff claims that UMC, the Security Guards, Nurse Esther, and Dr. Marvasti violated his First Amendment right to free speech. It is well-settled that the government may not deny an individual benefits due to his exercise of free speech. The Ninth Circuit has held:

> [A] State may not use its control over discretionary government benefits in a manner that places excessive burdens on certain constitutional rights. Under the doctrine of "unconstitutional conditions," even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.

Vignolo v. Miller, 120 F.3d 1075, 1077 (9th Cir. 1997) (emphasis added). Plaintiff argues UMC, the Security Guards, Nurse Esther, and Dr. Marvasti violated his First Amendment rights by wrongfully discharging him from UMC in retaliation for his complaints of inadequate care. Plaintiff alleges Nurse Esther and Dr. Marvasti impermissibly terminated his medical treatment after he complained about his injured hand and the treatment he was receiving. Because Plaintiff alleges government actors denied him a benefit as a result of exercising his First Amendment right to free speech, this cause of action against the Security Guards, Nurse Esther, Dr. Marvasti in their individual capacities states a First Amendment claim cognizable under § 1983.

Plaintiff argues in his third cause of action that UMC, the Security Guards, Nurse Esther, and Dr. Marvasti violated Nevada law by committing professional negligence and inflicting extreme emotional distress. Plaintiff claims this Court has jurisdiction over based on pendent jurisdiction.

See Second Amended Complaint at ¶ 19. Under the doctrine of supplemental jurisdiction, previously pendent jurisdiction, a federal court may hear state claims that are part of the "same case or controversy" as a claim arising under federal law. 28 U.S.C. § 1367(a). This court has supplemental jurisdiction over Plaintiff's state law claims because they arise from the same "nucleus of operative fact" – namely, Plaintiff's discharge from UMC – as his valid federal claims. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

Nevada defines professional negligence as "a negligent act or omission to act by a provider of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death." N.R.S. 41A.015. "Provider of health care" includes a licensed physician, licensed nurse, and also a licensed hospital and its employees. N.R.S. 41A.017. Nevada also recognizes the tort of intentional infliction of emotional distress ("IIED"), which requires "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation." Star v. Rabello, 97 Nev. 124, 125 (1981). Finally, Nevada allows recovery for negligent infliction of emotional distress ("NIED") based on "'the general principles of tort law, including the concepts of negligence, proximate cause, and foreseeability." State v. Eaton, 101 Nev. 705, 713 (1985), overruled in part on other grounds, State ex rel. Dept. of Transp. v. Hill, 114 Nev. 810, 818 (1998) (quoting Dillon v. Legg, 441 P.2d 912, 924 (1968)); Chowdhry v. NLVH, Inc., 109 Nev. 478, 482-83 (1993) (extending NIED recovery to cases where the negligent act was committed directly against the plaintiff, rather than where plaintiff is a bystander to the negligent act). Here, Plaintiff has stated claims for professional negligence, IIED, and NIED against UMC, the Security Guards, Nurse Esther, and Dr. Marvasti in their individual capacities by alleging that they "provid[ed] inadequate medical and mental health care" to Plaintiff and wrongfully discharged him from UMC and inflicted extreme emotional distress upon him.

**D. Conclusion.**

Plaintiff states valid § 1983 claims against UMC, the Security Guards, Nurse Esther, and Dr. Marvasti in their individual capacity for relief based on alleged violations of Thompson's rights under the First and Fourteenth Amendments, as well as Nevada state law governing professional negligence,

IIED, and NIED. Because Plaintiff has not alleged any wrongdoing on the part of the Doe Defendants, they will be dismissed for failure to state a claim on which relief can be granted.

**II. UMC's Motion (Dkt. #33).**

The Motion (Dkt. #33) seeks clarification whether any responsive pleading to any of Plaintiff's complaints is due. Alternatively, UMC seeks an extension of time to respond to Plaintiff's First Amended Complaint until February 7, 2009. UMC states that it is unclear whether it is required to respond to the First Amended Complaint because Plaintiff filed a Second Amended Complaint which has not been screened by the court or served upon Defendants. The court has now screened the Second Amended Complaint, and it will be filed, thereby superceding Plaintiff's First Amended Complaint and obviating the need to file a responsive pleading to the First Amended Complaint.

UMC's Motion for Clarification (Dkt. #33) will be granted.

Based on the foregoing,

**IT IS ORDERED** that:

1. The Clerk of the Court shall file the Second Amended Complaint.
2. Defendants UMC, Dr. Marvasti, and Nurse Esther shall have until **February 10, 2009** in which to file an answer or other responsive pleading.
3. Plaintiff may, at a later date, amend the complaint to reflect the true identity of the Security Guards once he has ascertained such information from hospital officials or through the discovery process.
4. From this point forward, Plaintiff shall serve upon Defendants, or, if appearance has been entered by counsel, upon the attorney(s), a copy of every pleading motion or other document submitted for consideration by the court. Plaintiff shall include with the original papers submitted for filing a certificate stating the date that a true and correct copy of the document was mailed to the defendants or counsel for the defendants. The court may disregard any paper received by a District Judge or Magistrate Judge which has not been filed with the Clerk, and any paper received by a District Judge, Magistrate Judge, or the Clerk which fails to include a certificate of service.

/ / /

5. The Motion for Clarification (Dkt. #33) is **GRANTED.** UMC is not required to file a responsive pleading to Plaintiff's First Amended Complaint, but it shall respond to the Second Amended Complaint pursuant to the Federal Rules of Civil Procedure.

**IT IS RECOMMENDED** that:

1. The Second Amended Complaint's causes of action against the Doe Defendants be **DISMISSED** for failure to state a claim upon which relief can be granted.

2. All claims against Defendants Dr. Marvasti, Nurse Esther, and the Security Guards in their official capacities be **DISMISSED** for failure to state a claim upon which relief can be granted.

Dated this 30th day of January, 2009.

PEGGY A. LEEN
UNITED STATES MAGISTRATE JUDGE

**NOTICE**

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court. Pursuant to Local Rule of Practice (LR) IB 3-2(a), any party wishing to object to the findings and recommendations of a magistrate judge shall file and serve *specific written objections* together with points and authorities in support of those objections, within ten (10) days of the date of service of the findings and recommendations. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's Order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). The points and authorities filed in support of the specific written objections are subject to the page limitations found in LR 7-4.